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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1982

DAVID L. HERBST,
*Petitioner,*

*v.*

STATE OF WISCONSIN,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

## RESPONDENT'S BRIEF AND APPENDIX IN OPPOSITION

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ON PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN COURT OF APPEALS, DISTRICT III

## RESPONDENT'S BRIEF IN OPPOSITION

## SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for the following reasons. This case involves merely the application of well-settled principles of law to the particular facts of the case. No federal question exists. The principles of law utilized by the state courts are in harmony with decisions of this Court and federal courts of appeals. The decision of the state court did not deny the petitioner any constitutional right. The petitioner has distorted the facts of the case in an effort to induce this Court to grant a writ of certiorari.

## ARGUMENT

The sole issue in this case is whether the petitioner was denied his sixth amendment right to assistance of counsel and thus his fourteenth amendment right to due process of law.

The test for effective assistance of counsel under Wisconsin law is that it be "equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services." *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973). This test was adopted to replace the less stringent "sham and mockery" test. *State v. Harper*, 57 Wis. 2d at 552, 557.

The "ordinarily prudent lawyer" standard is in harmony with the standard employed by this Court and the federal courts of appeals. This Court has stated that the effectiveness of a defendant's counsel depends "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Tollett v. Henderson*, 411 U.S. 258, 268 (1973).

Since *McMann*, the federal courts of appeals in at least ten circuits have replaced the "sham and mockery" standard with various formulations of the "range of competence" test. *See Dyer v. Crisp*, 613 F.2d 275 (10th Cir.), *cert. den.*, 445 U.S. 945 (1980). These formulations have been stated as: "the reasonably competent assistance of an attorney acting as his diligent conscientious advocate" in the District of Columbia; "reasonably competent assistance" in the First Circuit; "the customary skill and knowledge which normally prevails at the time and place" in the Third Circuit; "representation ... within the range of competence demanded of attorneys in criminal cases"

in the Fourth Circuit; "reasonably likely to render and rendering reasonably effective assistance" in the Fifth and Sixth Circuits; the "expected professional standards and ... customary skills and diligence of a reasonably competent attorney" in the Seventh and Eighth Circuits; "reasonably competent and effective representation" in the Ninth Circuit; "the skill, judgment and diligence of a reasonably competent defense attorney" in the Tenth Circuit. *Dyer v. Crisp,* 613 F.2d at 276-278 (citations omitted). These formulations are the functional equivalent of the Wisconsin standard. Thus the petitioner cannot claim that there is a question of federal law that needs to be decided or conflict of law that needs to be resolved.

The petitioner is in error when he claims that his right to the effective assistance of counsel was denied. The petitioner's sole basis for so claiming is the alleged failure of trial counsel to avail himself of a statutory limitation on impeachment by evidence of criminal conviction.[1] The petitioner's attorney elicited from him on direct examination the fact that he had been convicted of two crimes.[2] Although sec. 906.09, Wis. Stats. (R-Ap-102), requires a judicial determination that the probative value of evidence of a criminal conviction outweigh any unfair prejudice, there is ample authority for the proposition that the statute applies only to cross-examination. *See* Judicial Council Committee's Note, Handbook Wisconsin Rules of Evidence, 59 Wis. 2d. Rp., page R177; 63 Op. Att'y Gen. 424 (1974); *Underwood v. Strasser,* 48 Wis. 2d 568, 571, 180 N.W.2d 631 (1970); *Nicholas v. State,* 49 Wis. 2d 683, 689, 183 N.W.2d 11 (1971). Moreover, although the record in this case is not at all times a model of clarity, a review of same shows that a judicial determination of admissibility was made.[3]

[1]Amended motion seeking postconviction relief, 10-1-81, p. 1

[2]Trial transcript, pp. 676-679.

[3]Trial transcript, pp. 666-669, corrected trial transcript p. 2; postconviction motion transcript, 9-21-81, pp. 76-82; trial court

Even if any statutory requirement of a judicial determination of admissibility was not met, the petitioner cannot claim that he was denied the effective assistance of counsel. The sixth amendment does not require error free representation. *Dyer v. Crisp,* 613 F.2d at 278; *McMann v. Richardson,* 397 U.S. at 770-771, 90 S.Ct. at 1448-1449; *Roe v. State,* 95 Wis. 2d 226, 236, 290 N.W.2d 291 (1980); *State v. Nye,*100 Wis. 2d 398, 302 N.W.2d 83 (Ct. App.), *aff'd per curiam,* 105 Wis. 2d 63, 312 N.W.2d 826 (1981). A comparison of the facts in this case with those in other cases where an appeal based upon alleged ineffectiveness of counsel was denied, shows that petitioner's attorney's representation was well within the range of competence demanded by federal courts and the state court alike. *See Washington v. Watkins,* 655 F.2d 1346 (5th Cir. 1981); *Leroux v. State,* 58 Wis. 2d 671, 207 N.W.2d 589 (1973); *Dean v. Israel,* 516 F.Supp. 477, 492 (E.D. Wis. 1981); *United States v. Fleming,* 594 F.2d 598, 607 (7th Cir. 1979); *United States ex rel.Ortiz v. Sielaff,* 542 F.2d 377, 380 (7th Cir. 1976); *United Statesv. Murzyn,* 631 F.2d 525, 533-534 (7th Cir. 1980); *United States ex rel. Williams v. Twomey,* 510 F.2d 634 (7th Cir. 1975).

The petitioner's attack on the Wisconsin courts' procedure for dealing with allegations of ineffective assistance of counsel is a make-weight argument to create a federal question where there is none. Before appealing on the grounds of incompetence of trial counsel, a postconviction hearing must be held in the trial court wherein trial counsel testifies as to his or her actions and the reasons therefor. *State v. Machner,* 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). The trial court found that the petitioner's trial counsel's representation met the requisite standard of

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decision on amended motion seeking postconviction relief, 11-23-81, R-AP-103.

competence.[4] This decision entailed weighing the credibility of trial counsel against that of the petitioner, who also testified at the postconviction hearing, on issues where their testimony was contradictory.[5]

The trial court's decision also entailed weighing the credibility of the expert witnesses called by each side.[6] Contrary to the assertion in the petition for certiorari, one of the experts testified that trial counsel's representation met the standard for competence.[7] The witness could only have testified consistent with the petitioner's position if he assumed facts that he believed to be untrue.[8] The expert witness testifying for the petitioner had not even read the entire transcript of the trial.[9] The trial court found the expert testifying for the state to be more credible.[10]

The court of appeals affirmed the trial court's decision.[11] A trial court's findings of fact will not be overruled unless contrary to the great weight and clear preponderance of the evidence. *See State v. Felton*, 110 Wis. 2d 485, 329 N.W.2d 161 (1983); *State v. Nye*, 100 Wis. 2d 398, 410, 302 N.W.2d 83 (Ct. App.), *aff'd per*

[4]Trial court decision on amended motion seeking postconviction relief, 11-23-81, R-AP-101, 104.

[5]Trial court decision on amended motion seeking postconviction relief, 11-23-81, R-AP-103.

[6]Trial court decision on amended motion seeking postconviction relief, 11-23-81, R-AP-103.

[7]Postconviction motion transcript, 10-30-81, p. 50.

[8]Postconviction motion transcript, 10-30-81, pp. 50-82.

[9]Postconviction motion transcript, 10-30-81, p. 29.

[10]Trial court decision on amended motion seeking postconviction relief, 11-23-81, R-AP-103.

[11]*State v. Herbst*, No. 81-2441-CR, filed 10-19-82, p. 1, Petitioner's Appendix 3a.

*curiam,* 105 Wis. 2d 63, 312 N.W.2d 826 (1981).' Nevertheless, the court of appeals independently reviewed the record and concluded that the petitioner had been competently represented at trial.[12] The procedure utilized to determine allegations of incompetence of trial counsel is more than adequate to protect the sixth amendment rights of criminal defendants.

From this sequence of events, the petitioner somehow concludes that this Court must rescue the sixth amendment from the Wisconsin courts. Deference to the "good sense and discretion of the trial courts" in regards to assuring competent criminal defense has found approval in the decisions of this Court. *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). The petitioner's assertion that Wisconsin appellate courts have never granted relief for incompetence of counsel is patently false. *See State v. Felton,* 110 Wis. 2d 485, 329 N.W.2d 161 (1983).

The words of the Wisconsin Supreme Court aptly expose the petitioner's attempt to concoct a federal question: "Criminal ... cases cannot be retried at the instance of the loser because he is more hopeful of success on a second try." *Cross v. State,* 45 Wis. 2d 593, 605, 173 N.W.2d 58; (1970).

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[12] *State v. Herbst,* No. 81-2441-CR, filed 10-19-82, pp. 2-3.

## CONCLUSION

For the reasons discussed above, the State of Wisconsin, respondent, respectfully asks this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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STATE OF WISCONSIN

CIRCUIT COURT

BRANCH II

MARINETTE COUNTY

Case No. 79-CR-317

DECISION ON AMENDED
MOTION SEEKING
POSTCONVICTION RELIEF

STATE OF WISCONSIN,
*Plaintiff,*

*-vs-*

DAVID L. HERBST,
*Defendant.*

The defendant has filed a motion for an order vacating his judgment of conviction and has requested a new trial for the reason that he was denied effective assistance of counsel in violation of rights secured to him by the Sixth and Fourteenth Amendments of the United States Constitution. This Court denies that motion.

In his brief the defendant concedes that some aspects of trial counsel's representation were excellent. The defendant's claim of ineffective representation centers around the fact that trial counsel brought out the fact of defendant's two prior convictions on direct examination of the defendant without first getting a determination by the Court on the record of whether the fact of his convictions would be admissible.

The Wisconsin Statute governing the admissibility of the evidence of a conviction of a crime for impeachment purposes reads as follows:

"906.09 Impeachment by evidence of conviction of crime.

(1) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible. The party cross-examining him is not concluded by his answer.

"(2) Exclusion. Evidence of a conviction of a crime may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

(3) Admissibility of conviction. No question inquiring with respect to conviction of a crime, nor introduction of evidence with respect thereto shall be permitted until the judge determines pursuant to Sec. 901.04 whether the evidence shall be excluded."

Attorney Lyons testified at the hearing on this motion that he did not believe for one minute that this trial court, or any other Wisconsin court would not allow the fact of the prior convictions to be admitted for impeachment purposes. He regarded an attempt to have the fact of the convictions suppressed as a futile effort which might anger the judge and distract from the real issue of whether the plaintiff could go into the circumstances surrounding the two prior convictions. There is nothing in the record which indicates that assessment of the situation was incorrect.

The question of whether the plaintiff would be allowed to go beyond eliciting the fact of the convictions and the number on convictions was a close one. The State moved the court for permission to inquire

into the nature of those crimes, specifically the name of the statute violated. The plaintiff's trial counsel indicated that it would probably take at least a day of testimony to prove up the connection. This court held that unless the nature of the prior convictions was gone into in detail, inquiring into the name of the specific statute would be of no probative value. This court held to allow the plaintiff to go into detail would involve a lot of time on what could become a side issue, and in view of the added emphasis unduly prejudice the defendant. This court implicitly held that the fact of the convictions could be admitted in its ruling.

The defendant testified that Attorney Lyons had told him prior to the day that he began testifying that the evidence of his convictions could not be used to impeach his testimony. The defendant testified that when he was about to testify at the trial Attorney Lyons told him that he had made a mistake and that he would have to testify as to his convictions. This court does not accept that testimony.

In his reply memorandum the defendant also claims that it was ineffective representation for his trial counsel to rely so heavily on the defendant's testimony if counsel knew that his credibility could be impeached by prior convictions. This criticism appears to be in the nature of Monday morning quarterbacking. In view of the state of the defendant's records, it would appear all but impossible to defend against the charges without the defendant testifying as to his intent at the time claims for reimbursement were made.

The plaintiff and the defendant called experts to testify on this motion. Their opinion differed on whether the defendant had been adequately represented. This court agrees with the opinion of Attorney Gerald Boyle.

The defendant failed to meet his burden of proving that his counsel's representation did not meet the standard set out in *State -v- Harper,* 57 Wis. 2d 543 (1973). This court finds that Attorney Kevin Lyons' trial representation was equal to that which the ordinarily prudent lawyer, skilled or versed in criminal law would give to his client. The defendant's motion for a new trial must be denied.

Dated November 23, 1981

/s/ William M. Donovan

William M. Donovan
Circuit Judge Branch II